

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Review of the Pioneer's)
 Preference Rules)

ET Docket No. 93-266

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision") by its attorneys, hereby submits its comments with respect to the Commission's Notice of Proposed Rulemaking^{1/} in the above-captioned proceeding. The Commission's Notice seeks to assess the need for its pioneer's preference rules in light of recently enacted competitive bidding legislation.^{2/} The Commission seeks comment on whether the original basis and purpose behind the pioneer's preference rules continues to support the need for preferential treatment for innovators.^{3/}

^{1/} Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking, FCC No. 93-477 (Released October 21, 1993) ("Notice" or "NPRM").

^{2/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387, enacted August 10, 1993; Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking (FCC 93-455, released October 12, 1993) (Competitive Bidding NPRM).

^{3/} See Notice at ¶ 1.

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INTRODUCTION AND SUMMARY

Cablevision Systems Corporation believes that the Commission should not lightly take actions which undercut its pioneer preference policies, which Cablevision agrees are critical to fulfilling the Commission's statutory mandate to encourage the development of innovative technologies and services. Cablevision too has invested substantial time and effort in the development of pathbreaking and cost-effective technologies for the provision of Personal Communications Services utilizing our nation's ubiquitous cable television infrastructure. These efforts were taken in part in reliance upon the possibility of gaining recognition and additional return on these investments through the award of a pioneer preference license permitting Cablevision to directly participate in the provision of PCS to the American public.

Cablevision submits that the Commission should, as a general matter, continue to award pioneer preferences in order to both encourage and reward parties who make genuine and substantial contributions to the development of new or innovative technologies. The appropriate scope of a pioneer preference award will vary depending on the nature of the proposed service. In the context of PCS, Cablevision reiterates its position that award of a 20 MHz basic trading area license constitutes a reasonable reward for the efforts of pioneers in the broadband PCS service. Should the Commission determine, however, in light of its mandate under Congressional legislation authorizing the

use of competitive bidding, that it is more appropriate that pioneer preference awardees participate in competitive bidding, Cablevision believes that the efforts of pioneers can be adequately rewarded by granting duly designated pioneers a 50 percent discount of a winning bid for a major trading area license.

Based on its experience in participating in the pioneer's preference proceedings associated with broadband PCS, Cablevision also endorses the Commission's proposal to modify its pioneer's preference procedures so that only one major round of pleadings on pioneer preference requests is accepted, contemporaneously with the acceptance of comments on the rules for a particular service. This proposal will conserve Commission resources and ensure that Commission decisions are based only on the most current information available.

I. Consistent With its Original Intent in Implementing the Pioneer's Preference Rules, The Commission Should Retain its Rules to Encourage and Reward Innovation

A major premise of the Commission's suggestion in the Notice that awards of pioneer's preferences may no longer be warranted is that with the advent of competitive bidding, pioneers can essentially "control their own destiny" by submitting successful bids in an auction. Therefore, the Notice suggests that one goal which motivated the pioneer's preference rules, guaranteeing participation by pioneers in the provision of service, is no longer valid. Cablevision believes, however, that the pioneer's preference rules serve the public interest not simply by

guaranteeing participation by pioneers, but also by spurring and rewarding innovation. These independent goals were equally prominent in the Commission's consideration and adoption of the pioneer's preference rules,^{4/} and are no less compelling today. The Commission should therefore retain its pioneer's preference rules, in order to spur and reward innovation.

As an initial matter, Cablevision believes that it is easy to overstate the difference between a competitive bidding regime and the sorts of "private auctions" which took place under licensing via lottery. While a pioneer may be able to "control its own destiny" by submitting a winning bid at auction, this was also true following lotteries. Parties seeking to participate, for example, in cellular service, and willing to pay market prices to do so, generally succeeded in acquiring cellular licenses from lottery winners. This is not to say that it is not in the public interest that the government, as opposed to lottery winners, recover the value of the spectrum. The point is that as between the various goals of the pioneer's preference - guaranteeing participation, creating proper incentives and rewarding innovation - the benefit of the pioneer's preference in guaranteeing participation is relatively marginal.

^{4/} See generally Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd. 2766 (1990) (Pioneer's Preference NPRM); Pioneer's Preference Report and Order, 6 FCC Rcd. 3488 (1991); recon. granted in part, denied in part, 7 FCC Rcd. 1808 (1992) (Pioneer's Preference Recon. Order); Pioneer's Preference Further Recon. Order, 8 FCC Rcd. 1659 (1993).

Cablevision believes that the pioneer's preference rules remain necessary as both an incentive and as a reward for "parties who endeavor to undertake the effort and risk associated with the development of new services and technologies".^{5/} The pioneer's preference rules have served to ensure that "parties that develop innovative services or technologies and successfully pursue authorization of such innovations in proceedings before the Commission have an opportunity to benefit directly from their efforts."^{6/} The Commission has not before wavered from its belief "that a preference would encourage development of new services."^{7/}

In addition to guaranteeing that innovators will directly benefit from their efforts, the Commission recognized that a "significant reward should be given to induce innovators to present their proposals to the Commission in a timely manner".^{8/} Under the Commission's prior licensing mechanism, the regulatory uncertainty in the licensing process not only discouraged innovators from investing their time and effort into creating new communications services, but entrepreneurs were also discouraged because there was no guarantee that they would recoup developmental costs or earn profits from providing the services

^{5/} Pioneer's Preference NPRM, 6 FCC Rcd. at 2766.

^{6/} Pioneer's Preference Recon Order, 7 FCC Rcd. at 1808.

^{7/} Pioneer's Preference Report and Order, 6 FCC Rcd at 3490.

^{8/} Pioneer's Preference Report and Order, 6 FCC Rcd. at 3490.

they developed experimentally.^{9/} Thus, the Commission appropriately reduced regulatory burdens that "may inhibit innovators from presenting their proposals to the Commission in a timely manner and instead providing positive incentives for innovators."^{10/} Thus, the rules not only serve as incentive, but also as a reward to innovators and the entrepreneurs who invest in the new service.

The Commission should not now retreat from its original purpose -- "to encourage present and future innovators to submit proposals to the Commission that otherwise would not have been submitted due to the regulatory uncertainty for the innovator."^{11/} The Commission has repeatedly affirmed these goals and should continue its policies of encouraging innovation and rewarding pioneers by maintaining its pioneer's preference rules. It has been the Commission's policy that, by reducing uncertainty in the licensing process, the preference rules "foster the development of new services"^{12/} and "reward innovators by placing them on a separate track for obtaining a license."^{13/}

^{9/} Pioneer's Preference NPRM, 5 FCC Rcd. at 2766.

^{10/} Pioneer's Preference Further Recon. Order, 8 FCC Rcd. at 1659.

^{11/} Pioneer's Preference Recon. Order, 7 FCC Rcd. at 1811.

^{12/} Pioneer's Preference NPRM, 5 FCC Rcd. at 2766.

^{13/} Pioneer's Preference Further Recon. Order, 8 FCC Rcd. at 1660.

By encouraging innovation, the Commission has also been able to further its public interest goals of providing new technologies and services to the public.^{14/} The rules were specifically "designed to further the statutorily recognized public interest goal of encouraging the development of new technologies and services."^{15/} Indeed, the Commission has expressly recognized that "it serves the public interest to reward innovators by placing them on a separate track for a license"^{16/} and that "the pioneer's preference will serve the public interest in encouraging new and innovative communications services".^{17/} Despite the fact that the Commission has changed its licensing mechanism, innovators continue to need the incentive provided by assurance that they will be rewarded with preferential treatment for undertaking the efforts and risks associated with developing new communications services.

In short, Cablevision believes that there is ample basis in the policies underlying the pioneer's preference rules to justify retention of the rules even under a regime of competitive bidding. The critical task in the context of each service will be to fashion an award which is appropriate to the innovation involved and fits within the structure of the particular service.

^{14/} 47 U.S.C. § 157(a); see also 47 U.S.C. § 303(g).

^{15/} Pioneer's Preference Further Recon Order, 8 FCC Rcd. at 1659.

^{16/} Id., 8 FCC Rcd. at 1660.

^{17/} Pioneer's Preference Report and Order, 6 FCC Rcd. at 3490.

II. Award Of A Single 20 MHz Basic Trading Area License Outside Of Auctions, Or A Substantial Discount On A Successful Bid For A Major Trading Area License, Would Be Appropriate For Pioneers In The Broadband PCS Service

The Commission has deferred identification of the appropriate award to finally designated pioneers in the broadband PCS proceeding pending the outcome of this rulemaking. As indicated in Section I, Cablevision does not believe that it is appropriate or desirable to entirely abolish pioneer preferences given the importance of these preferences in spurring and rewarding innovations. Application of any prospective repeal of pioneer's preferences in the broadband PCS proceeding would not only be inconsistent with these goals, but would also be manifestly unfair. Many parties, including Cablevision, have undertaken investments in the development of innovative PCS technologies in reliance upon at the least the possibility of an ultimate pioneer preference award. Cablevision, however, disagrees with the more grandiose requests of the tentative awardees of broadband PCS pioneer's preferences in ex parte comments filed prior to the issuance of the Notice,^{18/} and believes that a more modest award would be more than sufficient to reward past innovation and to spur future innovation.

^{18/} In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, Omnipoint Corporation, Gen. Dkt. 90-314 (September 29, 1993) at 7,8; In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, Cox Enterprises, Inc., Gen. Dkt. 90-314 (September 28, 1993) at 2-4; In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, American Personal Communications, Gen. Dkt. 90-314 (September 27, 1993) (hereinafter Cox Ex Parte Presentation) at 3-4.

Cablevision believes that pioneer preferences can best be fit within the licensing structure for broadband PCS, while still preserving adequate incentives for investments by true pioneers, by awarding a single 20 MHz basic trading area license in the 1.9 GHz band to each pioneer. This result would address the most compelling consideration offered by the tentative awardees, that final awardees must be permitted to immediately participate in PCS in the frequency band where they have made substantial and innovative contributions, and where they have expended resources to develop compatible technologies and equipment. Having induced parties such as Cablevision to invest substantial resources in developing equipment and technology which can operate at 1.9 GHz, the Commission should not force such parties to undertake yet further development efforts, or await development efforts by others, before conditions will permit provision of service at 2.1 GHz. Award of a single BTA license at 2.1 GHz would also unfairly marginalize those pioneers who are finally found to have made the most substantial contributions to the development of PCS at lower frequency bands. Cablevision agrees with Commissioner Barrett that 10 MHz BTA licenses, standing alone, are likely to be insufficient for other than niche applications.^{19/}

Cablevision disagrees, however, with the suggestions of the tentative awardees to the extent that they argue that more than a

^{19/} See In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Dkt. No. 90-314 (September 23, 1993), Andrew C. Barrett issuing dissenting statement (September 23, 1993) (hereinafter Barrett Dissenting Statement) at 12-13.

20 MHz basic trading area license is necessary to achieve the purposes underlying the Commission's pioneer preference policies. Award of a 30 MHz major trading area license would, as Commissioner Barrett has suggested, have an excessively "preclusive effect," and may even qualify as a windfall for the final awardees^{20/}. Moreover, the grounds offered by certain of the tentative awardees for greater awards have no basis in pioneer preference policy. Cox, for example, cites the presence of blockage by microwave users in its chosen market in order to justify a 30 MHz award^{21/}. Of course, as Cablevision argued in its comments in Gen. Docket 90-314, substantial portions of the PCS band nationwide have significant blockage. The pioneer preference policy, however, is not intended to ensure that a pioneer can have clear spectrum in whatever market it selects for its own reasons, any more than any other PCS licensee is guaranteed clear spectrum. Similarly, the fact that the award of a single BTA to APC would somehow divide the "natural" economic market it seeks to serve is of no relevance if, as Cablevision believes it should, the Commission determines that award of a 20 MHz BTA license creates sufficient incentives consistent with its pioneer preference policies.

More generally, notwithstanding the importance of pioneer preferences in creating such incentives, Cablevision believes that the more apocalyptic assertions by the tentative awardees,

^{20/} Barrett Dissenting Statement at 5.

^{21/} See Cox Ex Parte Presentation at 1, n.1.

that certain of the awards under consideration would eliminate incentives to provide innovative technologies, are overblown. While pioneer preferences offer a powerful inducement for investments in innovative technologies, they are obviously not the only such inducement. Parties who genuinely develop commercially viable technological and service innovations will also be rewarded through acceptance of their technologies and services in the marketplace. Omnipoint, for example, will, if its equipment ultimately passes not only the test of technical feasibility, but also the test of commercial acceptance, be rewarded by purchases of its equipment. Cablevision's own efforts have already been recognized by a large measure of marketplace acceptance of its innovative cable-based distributed antenna technology, as well as its distributed antenna "Platform" technology, which is capable of serving multiple PCS licensees using different modulation schemes. This acceptance was manifested most recently by a firm order by a major cable MSO for Platform products.

Cablevision believes that the overriding consideration in the Commission's deliberations as to the appropriate scope of pioneer preference awards for broadband PCS should be that pioneers must be provided access to the frequency band in which their pioneering efforts took place. Beyond this, Cablevision firmly believes that a 20 MHz basic trading area license is sufficient to give appropriate incentives to true pioneers.

If the Commission should conclude that award of a "free" license is inconsistent with either the spirit or the letter of the competitive bidding legislation, Cablevision submits that it is nonetheless important to ensure that broadband PCS licensees are duly rewarded. Cablevision believes that the proposal in the NPRM to permit significant discounts on winning bids by pioneers represents the most reasonable means of insuring adequate incentives if pioneers are to be included in competitive bidding, rather than licensed separately. Again, however, it is important not to provide an excessive windfall to pioneers. Thus, rather than granting a blanket discount on any number of bids by a pioneer, the Commission should limit the discount to a single successful bid. Cablevision believes that a 50 percent discount on a successful bid for a major trading area license in the broadband PCS service would adequately reward broadband PCS pioneers while not providing an excessive windfall.

III. The Commission Should Modify Its Pioneer's Preference Procedures To Permit Simultaneous Comment On Pioneer Preference Awards With The Rules For A Particular Service, But Should Not Apply Any Procedural Changes Retroactively

The Notice proposes a number of procedural and substantive changes in the Commission's pioneer's preference policies. Based on its experience in the broadband PCS pioneer preference proceedings, Cablevision strongly endorses the Commission's proposal to revise its pioneer preference procedures to eliminate the filing of substantial comments on requests for pioneer's preferences prior to the issuance of a Notice of Proposed Rulemaking for a particular service. An inherent difficulty in

the pioneer preference process, likely to be replicated in the context of any new service, is the extraordinary pace and scope of technological change as parties pursue the development of a new service. Moreover, what appear to be promising technologies at the early stages of a development of service, may ultimately have little relevance as the service comes closer to fruition.


Cablevision's observations of the experience with PCS bear this out. Initial requests for pioneer preferences and PCS were required to be filed by May 1992. At that point, little PCS equipment was available. The pressures created by the pioneer preference proceeding, however, generated an amazing flurry of announcements of so-called "firsts," which consisted of little more than a party being first to accept delivery of a vendor's prototype equipment, hooking it up, turning it on, and declaring an "innovation." The initial round of pioneer preference pleading, in turn, was often a meaningless exercise in hyping ones' own "firsts." Similarly, many of the technologies involved in these "firsts" have not withstood the test of time.

There will always be a certain amount of uncertainty and flux associated with identifying technological innovation. Cablevision believes that this process is more likely to produce accurate results if it is deferred as late as possible in the formulation of rules for a service. Thus, by the time a Notice of Proposed Rulemaking is issued for a service, it should be more reasonable to expect that a greater level of technological advance and shakeout shall have taken place, and true innovators

will be more easily identified. This approach will also conserve Commission resources by eliminating the need to consider discussions of technological developments at earlier stages.

Cablevision also wishes to address one additional procedural issue. As indicated in Section II, Cablevision has no objection to the Commission defining the appropriate award for pioneers in the broadband PCS proceeding as part of this proceeding. A number of the procedural suggestions, however, would constitute a departure from the procedures actually employed in the broadband PCS pioneer preference proceeding. Since all parties involved, including Cablevision filed their submissions in reliance upon the substantive standards and procedures as they existed at that time, it would be manifestly unfair for the Commission to apply any changes in its substantive PCS procedures and standards retroactively in the broadband PCS pioneer preference proceeding.

Respectfully submitted,



Charles D. Ferris
James A. Kirkland
Kecia Boney
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Attorneys for Cablevision
Systems Corporation

Dated: November 15, 1993

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CERTIFICATE OF SERVICE

I, James A. Kirkland, hereby certify that a copy of the foregoing letter has been sent by United States mail, first class and postage prepaid, to the following on this 15th day of November, 1993:

- * The Honorable James H. Quello
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

- * The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

- * The Honorable Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

- * Mr. Robert Corn-Revere
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

- * Mr. Byron F. Marchant
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

- * Mr. Randy Coleman
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

- * Ms. Maureen O'Connell
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

- * Dr. Robert M. Pepper
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554
- * Dr. Thomas P. Stanley
Chief, Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554
- * David R. Siddall, Esq.
Chief, Frequency Allocation Branch
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7102
Washington, D.C. 20554
- * Mr. Thomas Mooring
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7330
Washington, D.C. 20554
- * Mr. Rodney Small
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7332
Washington, D.C. 20554
- * Mr. H. Franklin Wright
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W.
Room 7322
Washington, D.C. 20554
- * Mr. Fred Thomas
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W.
Room 7338
Washington, D.C. 20554

* Mr. Thomas P. Derenge
Federal Communications Commission
2025 M Street, N.W.
Room 7130
Washington, D.C. 20554

* International Transcription Service
1919 M Street, N.W.
Room 246
Washington, D.C. 20554

Brenda J. Fox
Leonard J. Kennedy
Laura H. Phillips
Dow, Lohnes & Albertson
1225 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Werner Hartenberger
Laura Phillips
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Mark J. Tauber, Esq.
Piper & Marbury
1200 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Mr. Douglas G. Smith
President
Omnipoint Data Company, Inc.
7150 Campus Drive
Suite 155
Colorado Springs, CO 80920

Jonathan D. Blake
Kurt A. Wimmer
Ellen K. Snyder
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

James A. Kirkland/rb
James A. Kirkland

* - Via Hand Delivery

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